IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. _____

DAVID KRAMER,

Petitioner,

vs.

BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., a corporation, OLIN H. STAPP, an individual, AIR-VENT (ALUMINUM) AWNINGS CO., a corporation, and SEARS, ROEBUCK AND CO., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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In Propria Persona

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BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., a corporation, OLIN H. STAPP, an individual, AIR-VENT (ALUMINUM) AWNINGS CO., a corporation, and SEARS, ROEBUCK AND CO., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a Writ of Certiorari issue to review the judgment of the Court of Appeal, Second Appellate District, Second Division of the State of California, 2nd Civil No. 36228, order dismissing appeal; filed August 27, 1970; modified August 28, 1970 (Appendix [A]).

JURISDICTION

The judgment of the Court of Appeal, Second Appellate District, Second Division, State of California, was entered August 27, 1970, modified August 28, 1970. A timely petition for rehearing was filed on September 11, 1970, and was denied on September 16, 1970. A Petition for Hearing by the Supreme Court of California was filed on October 2, 1970, and was denied on October 22, 1970. The jurisdiction of this court is invoked under 28 U.S.C. 1257.

QUESTION PRESENTED

State of California, Second Appellate District, Division Five. Presiding Justice J. Aiso with Justice J. Stephens concurring, having prior knowledge of the two points that the appellants would use as the bases of their appeal issued a writ of mandate compelling the appellants to proceed in the preparation of their appeal in conformity with Rule 4, subdivision (B), California Rules of Court. Division Two of the same appellate district, acting upon a motion of the respondent's attacking one of the two points being used by the appellants, dismissed the appeal on the grounds that the appellant did not provide the entire record of oral proceedings and accordingly has not produced a record which may be accepted as complete under the rules on appeal as required under Rule 4, subdivision (A), California Rules of Court.

STATEMENT OF THE CASE

I

Where in the Court of Appeal of the State of California, Second District, Division Five, let a peremptory writ of mandamus directing the Superior Court to issue appropriate orders to the real parties in interest to file amended notices to the clerk to prepare the clerk's and reporter's transcript in conformity with Rule 4, subdivision (B), California Rules of Court, within ten days from the date of such order: The respective parties to thereafter pursue further preparations of the record on appeal in conformity with Rule 4(B) of the Rules of Court governing preparation of such records (Appendix [A]).

II

Wherein the petitioner (now respondent) petitions in the Court of Appeal, Second Appellate District, State of California, Division Five, for a rehearing, points and authorities and proof of service; asking that the opinion filed May 16, 1969, be modified to include Rule 4, subdivision (A) of the California Rules of Court (Appendix [B]). Petition denied.

III

Wherein the petitioner (now respondent) petitions in the Supreme Court of the State of

California, for a hearing on June 24, 1969 (Appendix [C]). Petition denied.

IV

Wherein such peremptory writ of mandate did issue appropriate orders to the real parties in interest to file such amended notices (Appendix [D]).

V

Wherein the real parties in interest (appellants) filed their timely amended notices to the clerk (Appendix [E]). (Appendix E-4, 5 was signed by the trial judge with the approval of opposing counsels.)

VI

Wherein the appellants in pursuing further preparations of the record on appeal in conformity with Rule 4, subdivision (B), California Rules of Court, based their appeal on two points and instructed the clerk of the Superior Court to forward to the Court of Appeal all of the Exhibits, the clerk's transcript and also the reporter's complete oral transcript of certain designated witnesses; that appellants would rely upon in its effort to convince the appellate court to vacate the trial court's decision.

VII

Wherein the Court of Appeal denied without prejudice the application for order allowing and directing Superior Court Clerk to transmit and file part of record on appeal (Appendix [F]).

VIII

Because the Court of Appeal did not accept the records, all 621 Exhibits in the records were lost (Appendix [G]).

IX

Wherein the appellants having completed and fulfilled all the requirements of Rule 4, subdivision (B), California Rule of Court; prepared the Appellants' Brief; which was timely filed (after three extentions needed to replace the Exhibits from plaintiffs' personal file) June 11, 1970.

Therefore a complete record was made available and presented to the Court of Appeal, Second District of the State of California and directed to the Division Five thereof.

X

On May 25, 1970, respondents filed a notice of motion to strike point on appeal and

dismiss appeal as to said point (Appendix [H]), and requesting appellants' appearance in opposition to the motion, on July 9, 1970, at 9:30 a.m. in the Second Appellate District in Division Two.

XI

On June 9, 1970, appellants filed points and authorities in opposition to motion to strike point on appeal and dismiss appeal as to said point (Appendix [I]).

XII

On July 6, 1970, respondents filed an application for extention of time to file Respondents' Brief (Appendix [J]). (Actually the order shortened the time.)

XIII

Division Two is presided over by Justice Lester William Roth, who is a banker serving on the Board of Directors of the City National Bank (19 branches in the Los Angeles trading area) and lists his private occupation as "a dealer in investments." The City National Bank is a member of the respondent Better Business Bureau. Justice Roy Herndon on the bench of Division Two, in private practice was a member of the firm of Meserve, Mumper and Hughes. This firm represents the repondent Better Business Bureau. For the purpose of hearing the motion

Justice Herndon sat as presiding justice.

The senior member of the firm of Meserve, Mumper and Hughes is on the Executive Board of respondent Better Business Bureau (Appendix [K]).

XIV

The court reporter's transcript of oral argument July 9, 1970, in the Court of Appeal of the State of California, Second Appellate District, Division Two (Appendix [L]).

XV

The appellants filed a supplemental brief in their attempt to convince the court that the appeal should not be dismissed, and also filed a plea to the justices of Division Two to disqualify themselves from the proceedings, because of their financial interest in the case (both the City National Bank and the firm of Meserve, Mumper and Hughes as members of the respondent Better Business Bureau would be liable in damages, if the appellants would prevail.)

XVI

The appellants did not prevail and the appeal was dismissed (Appendix [M]).

XVII

Respondents Better Business Bureau's Publication, sent to their members, who act as managers for the Bureau, announcing and noticing their members of the law suit (Appendix [N]).

CONCLUSION

I

It is very obvious from the proceedings as shown in paragraphs I through XVII herein and beyond any reasonable doubt that collusion existed, wherein the justices of the Court of Appeal, of the State of California, Second District, Division Two combined with the respondents' attorneys to dismiss and destroy appellants' appeal.

II

It is a positive fact that, had the proceedings of the appeal, gone as directed to the Court of Appeal of the State of California, Second District, Division Five, that this Court would not have contested the form of the appeal (Rule 4[B]) but would have gone immediately into the substance of the appeal.

III

That the only reason for the collusion between the justices of Division Two and the respondents' attorneys was because these parties knew that the 621 Exhibits, the oral testimony of the witnesses and the clerk of the court's transcripts that made up the appeal would result in the reversal of the trial court's decision (Appendix [O]).

IV

Being ever mindful that the ultimate judgment is that of the injured party, before God; the appellant emplores the Supreme Court of the United States, in the interest of justice, to grant this Petition for a Writ of Certiorari or other relief as this Honorable Court sees fit.

Respectfully submitted,

DAVID KRAMER

In Propria Persona

APPENDIX A

A majority of the signers of this opinion certify that it does not meet the standards for official publication under Rule 976.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., Petitioner, vs. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent, STANFORD H. BERMAN and DAVID KRAMER, Real Parties in Interest.	2d Civ. No. 34013 Court of Appeal-Second Dist. Filed May 16, 1969 Clay Robbins, Jr., Clerk Deputy Clerk

PROCEEDING in mandamus to compel respondent court to order a full reporter's transcript as part of record on appeal. Writ for appropriate relief granted.

Meserve, Mumper & Hughes and Downey A. Grosenbaugh for Petitioner.

Alvin R. Isenberg for David Kramer, a Real Party in Interest.

No appearances by Respondent or Stanford H. Berman, a Real Party in Interest.

Petitioner, Better Business Bureau of Los Angeles, Ltd., brings this proceeding in mandamus to review and have annulled an order of the Superior Court of Los Angeles County denying its motion for an order directing the clerk of that court to cause the preparation of a full and complete reporter's transcript on appeal, and for an order directing the superior court to grant the motion.

Mandamus is a proper remedy for this purpose. (Kaufman v. Brown (1951) 106 Cal.App.2d 686, 689; Cross v. Superior Court (1951) 104 Cal.App.2d 594, 595, disapproved on another point in Summers v. Superior Court (1959) 53 Cal.2d 295, 299.)

I.

In the case of Stanford H. Berman, et al., plaintiffs, vs. Better Business Bureau of Los Angeles, Ltd., et al., defendants, Los Angeles Superior Court No. 812684, a judgment was entered July 3, 1968, after a trial to the court sitting without a jury, wherein it was adjudged that the plaintiffs take nothing by virtue of their second amended complaint and that defendants have judgment against the plaintiffs, Stanford H. Berman and David Kramer for costs and disbursements. The amount awarded to the petitioner her ein was $2,306.41.

The losing plaintiffs, real parties in interest in this proceeding, Berman and Kramer, filed a notice of appeal from

the above judgment on September 3, 1968. The notice stated that plaintiffs appeal from the "Judgment entered on July 3, 1968 . . . in favor of the defendants and adjudging that plaintiffs take nothing by their Second Amended Complaint and the Judgment being based on defendants' motion pursuant to Section 631.8 of the Code of Civil Procedure."

Without stating the points to be raised by them upon appeal as required by Rule 4 subdivision (b), California Rules of Court, Berman and Kramer filed a notice to prepare reporter's transcript which directed preparation of only parts of the oral proceedings.

The notice to prepare the partial reporter's transcript was served on petitioner by mail on September 12, 1968, so it was incumbent upon petitioner to serve and file within ten days from September 13, 1968,[1/] its notice counter-designating the oral proceedings it desired to have transcribed. There appears to be no such notice by petitioner as required by Rule 4 subdivision (b) in the trial court's files. Even if the notice of motion (more fully described below) be construed as such a notice, it was not served or filed until September 24, 1968, which was one day too late.

1/ 1968 amendment to Code of Civil Procedure, section 1013 was not effective at this date.

Petitioner moved the superior court for an order directing and compelling the clerk of that court to cause a full and complete reporter's transcript, of all of the oral proceedings held, to be prepared, certified, and filed. Kramer filed a declaration in opposition to the motion disclosing for the first time that his appeal was based on two points: "(a) That the evidence presented by plaintiffs was adequate and sufficient to establish a prima facie case. (b) That Section 631.8 was inapplicable and beyond the right of the trial court to consider because defendants had alreay introduced evidence on their behalf."

On October 16, 1968, the superior court ruled: "Motion denied. Under California Rules of Court, Appellate Rule 12 (a), augmentation of the reporter's transcript is ordered by the reviewing court, not the trial court. The fact that plaintiff has not complied with Rule 4 (b) does not appear to be a ground for the instant motion."

The failure of the petitioner to file a timely counter-designation of the portions of the oral proceedings not designated by appellants, but which it desired to have transcribed, apparently was overlooked by the parties and the superior court.

II.

Neither petitioner nor the real parties in interest have complied with Rule 4 subdivision (b). The trial court misconstruing, we feel, the purpose and function of Rule 12 subdivision (a) of the California Rules of Court has refused to lend its assistance in the preparation of a record on appeal agreeable to all the parties. It is furthermore useless to permit the real parties in interest to bring up a record limited to those matters designated in their notice to prepare reporter's transcript. In Haskins v. Crumley (1957) 152 Cal.App.2d 64, the appellant omitted statement of the points he desired to raise on appeal as required by Rule 4 subdivision (b) and brought uponly a partial reporter's transcript. He sought to attack sufficiency of the evidence to support certain findings. The appellate court acting upon a motion to dismiss the appeal held that the appeal would be dismissed unless appellant brought up a complete reporter's transcript.

The "rules which prescribe the necessary proceedings on appeal and the time within which the various steps shall be taken, are mandatory and should not be relaxed save in those meritorious cases where (the) fault is clearly excusable." (Estate of Wolper (1956) 146 Cal.

App.2d 249, 251.)

There is, of course, no excuse in the record before us for petitioner not taking the remedial measure provided for its benefit under Rule 4 subdivision (b). The draftsman of the rule has noted: "The use of a partial, designated transcript, at the option of the appellant, permits a shortening of the record in cases where the issues and evidence is readily severable. Certain safeguards are added for the protection of the respondent: (1) the appellant must state his points on appeal; (2) there can be no designation of only a part of the testimony of a single witness, except by stipulation; (3) the respondent may counterdesignate any additional portions of the record. Thus, if the respondent desires a complete trancript, he may designate the balance of the record, subject only to a possible penalty under Rule 26 (a) for bringing up unnecessary record in bad faith."

The fact that appellants and real parties in interest, Berman and Kramer, are acting in propria persona [2/] does not excuse them from complying with the rule to any less degree

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2/ Attorney Alvin R. Isenberg limited his appearance on behalf of Kramer to the oral argument in this mandamus proceeding only.

than that to which a lawyer is held responsible. (Andreas v. California Milling Corp. (1959) 170 Cal.App.2d 228, 233; cf. Monastero v. Los Angeles Transit Co. (1955) 131 Cal.App.2d 156, 160-162.) Without a statement of points to be raised on appeal in the notice to the clerk to prepare reporter's transcript, there is no gauge by which the trial judge can know whether the portion of the oral proceedings designated by appellants adequately covers what actually transpired in the course of trial.

We digress to admonish Kramer, who is not a licensed attorney, that he may not sign or file papers on behalf of his co-party Berman. Such acts constitute the practice of law by one not licensed to practice law and are punishable as misdemeanors. (Bus. & Prof. Code, section 6125; Biakanja v. Irving (1958) 49 Cal.2d 647, 651; People v. Sipper (1943) 61 Cal.App.2d Supp. 844, 846.) Consequently, neither of the notices to the clerk for preparation of the clerk's or the reporter's transcript has been properly filed by Berman. These are subject to being stricken upon appropriate motion. (City of Downey v. Johnson (1968) a/ 263 Cal.App.2d ___, ___.)

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a/ Advance Report Citation: 263 A.C.A. 896, 905.

With reference to Rule 12 subdivision (a) of the California Rules of Court, which permits appellate courts in appropriate instances to order augmentation of the record, it has been held: "The motion to 'augment' cannot be used to create a record. Its function is to supplement an incomplete but existing record." (Estate of Larson (1949) 92 Cal.App.2d 267, 269; accord, Wagner v. Chambers (1965) 232 Cal.App.2d 14, 21.)

The motion before the trial court was one which concerned the preparation of the record on appeal, the supervisory function of which is, in the first instance, in the trial court. The filing of a notice of appeal neither divests the superior court of its power nor absolves it of its duty to make orders in aid of perfecting the record on appeal (Sullivan v. Superior Court (1954) 128 Cal.App.2d 476, 479), except where it is specifically curtailed, e.g., in Rule 45 subdivision (b). The county counsel's memorandum presented to the trial court at the time the motion was heard concedes that the trial court has this power and duty. (See Summers v. Superior Court (1959) 53 Cal.2d 295, 298.) It has also been held that where corrections to the transcript are requested by either party under Rule 8, it is the duty of the trial judge to hear and determine the request. (McMahon v. Superior Court (1946) 29 Cal.2d 515, 519.)

These rules are logical, for the trial judge who tried the case is in the best position to know what portions of the trial record should be sent forward to apprise the appellate court accurately and sufficiently as to what transpired in the trial court with reference to the point or points on which an appellant feels aggrived. Motions of the kind in question might be more appropriately heard and determined by the trial judge, rather than the law and motion department, if the matter is complex. The trial court file is approximately seven times as voluminous as the average civil case.

III.

Fairness to both the petitioner and the real parties in interest, as well as the interests of justice, would be promoted by granting relief to the real parties in interest to file amended notices to the clerk to prepare the clerk's and reporter's transcript conforming to the requirements of Rule 4 subdivision (b) and then have the respective parties pursue the preparation of the record in accordance with the ruleson appeal. A writ of mandate directing the superior court to take proceedings appropriate to that end should be granted.

IV.

Let a peremptory writ of mandamus issue directing the

superior court to issue appropriate orders to the real parties in interest to file amended notices to the clerk to prepare the clerk's and reporter's transcript in conformity with Rule 4 subdivision (b), California Rules of Court, within ten days from the date of such order; the respective parties to thereafter pursue further preparation of the record on appeal in conformity with the rules of court governing preparation of such records. The order made on October 16, 1968, denying petitioner's motion is ordered vacated; the alternative writ heretofore issued is discharged.

AIRO, J.

I concur:

STEPHENS, J.

2ND CIVIL NO.

34013

In the Court of Appeal

SECOND APPELLATE DISTRICT

State of California

BETTER BUSINESS BUREAU OF LOS ANGELES, LTD.,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent,

STANFORD H. BERMAN and DAVID KRAMER,
Real Parties in Interest.

PETITION FOR REHEARING, POINTS AND AUTHORITIES AND PROOF OF SERVICE.

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In the Court of Appeal

SECOND APPELLATE DISTRICT

State of California

BETTER BUSINESS BUREAU OF LOS ANGELES, LTD.,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent,

STANFORD H. BERMAN and DAVID KRAMER,
Real Parties in Interest.

PETITION FOR REHEARING, POINTS AND AUTHORITIES AND PROOF OF SERVICE.

To the Honorable Court of Appeal of the State of California, Second Appellate District, Division Five:

Pursuant to Rule 27 of the Rules on Appeal, petitioner hereby petitions for a rehearing of the above entitled cause, opinion filed May 16, 1969, modified May 20, 1969, and respectfully submits the following in support thereof.

I.

The opinion of this Court is contrary to the law in stating that "it was incumbent upon the petitioner to serve and file within 10 days from September 13, 1968, its notice counter-designating the oral proceedings it

desired to have transcribed". (Opinion, p. 3.) The error is compounded by the opinion further characterizing petitioner's conduct as a failure to comply with Rule 4, subdivision (b), California Rules of Court, Rules on Appeal. (Opinion, p. 4 last paragraph, p. 5 first paragraph, p. 6.)

The remedy provided to the respondent (petitioner herein) by Rule 4, subdivision (b) is permissive only.

> "Within 10 days . . . the respondent *may* serve and file a notice designating the oral proceedings and instructions given, not designated in the appellant's notice . . . which he desires transcribed." (Emphasis added.)

This is in direct contrast to the action required of the appellant, which is not only mandatory but is indeed a condition precedent to his further action and to any counter-action permitted to respondent. Rule 4(b) states in part:

> "*If* the appellant, in his notice to the clerk, states the points to be raised by him on the appeal, he may designate the portions of the oral proceedings to be transcribed, . . ." (Emphasis added.)

Thus, appellant may take advantage of the partial transcript at his option, but if and only if he has designated the points to be raised by him on appeal. Clearly, if he has not done so, respondent is without any basis for making an informed and discriminating designation of additional portions of the record to be transcribed. The opinion herein quotes from the Draftsman's Explanatory Notes (West's Annotated California Codes, Civil and Criminal Court Rules, Volume 23,

Part 1, p. 82) wherein this point is further emphasized:

". . . (1) the appellant *must* state his points on appeal;" (Emphasis added.)

". . . (2) the respondent *may* counter-designate any additional portions of the record." (Emphasis added.) (Opinion, p. 6.)

Estate of Wolper (1956), 146 Cal. App. 2d 249, 303 P. 2d 578 cited by this Court in its opinion (Opinion, p. 5) is not to the contrary, although the Court follows its reference to that case with the inference that some action was required of petitioner and that petitioner had a duty to provide a record excusing his failure to act. The *Wolper* case had under consideration Rules on Appeal *other than* Rule 4(b) under which this Court suggests respondent should have acted. The rules alluded to in *Wolper* were Rule 4(a), 4(c), 5(c), 7(a) and Rule 10, and are indeed mandatory; but the case does not speak to Rule 4(b), the language of which, by contrast, is permissive as to respondent's action:

4(a) ". . . *shall* serve . . . within 10 days . . . a notice to prepare a reporter's transcript . . ."

4(c) ". . . notice *shall* not be effective . . . unless, within 10 days . . . appellant *shall* deposit . . . or file . . ."

5(c) ". . . notice *shall* not be effective . . . unless, within 10 days . . . appellant *shall* make arrangements . . ."

7(a) ". . . appellant *shall* serve and file a notice so stating within 10 days . . ."

". . . within 30 days thereafter the appellant *shall* serve and file a condensed statement . . ."

". . . appellant *shall* state the points to be raised by him on appeal . . ."

10 ". . . clerk . . . *shall* notify the appellant that the filing fee *shall* be paid within 20 days . . ."

"After the expiration of such 20-day period the clerk *shall* not permit the filing of the record . . ."

In the case at bench Justice Aiso observed:

> "Without a statement of points to be raised on appeal in the notice to the clerk to prepare reporter's transcript, there is no gauge by which the trial judge can know whether the portion of the oral proceedings designated by appellant's adequately covers what actually transpired in the course of the trial."

By the same token, there is no gauge by which respondent can know what additional record may be necessary to inform the appellate court of other relevant evidence introduced in the course of the trial. In this connection it should be noted that the Draftsman's Explanatory Notes on Rule 4(b) previously cited (Opinion, p. 6) call attention to the fact that respondent is subject to a "possible penalty under Rule 26(a) for bringing up unnecessary record in bad faith". It is submitted that, absent any indication from appellant of the points to be raised by him on the appeal, respondent faces these risky alternatives: (a) Do nothing about augmenting the record on the assumption that appellant has generously requested transcription of all parts of the record unfavorable to his appeal; or (b) Counter-designate transcription of the entire balance of the record, and incur the certain cost of $18,000 to $20,000 for a transcript which might well expose him

to further penalty for bringing up an unduly voluminous record.

II.

Further, the opinion of this Court is in error in characterizing petitioner's action in the lower court as a failure to comply with Rule 4(b). Under that rule, if respondent does not wish the partial transcript enlarged, he can take no action at all and nevertheless be in full compliance. If, however, respondent does wish the record augmented, he must serve and file notice to that effect within the 10 days required by the rule. The filing by petitioner of its Notice of Motion for Order Compelling William G. Sharp, County Clerk, to Cause a Full Reporter's Transcript to be Prepared, Certified and Filed was not taken under the provision of Rule 4(b), for the reason that appellant's failure to designate the points to be raised by him on the appeal foreclosed both appellant and respondent from proceeding under Rule 4(b). By his general notice of appeal, appellant placed the matter squarely under Rule 4(a), and respondent's motion was directed to enforcing compliance by appellant and the clerk with Rule 4(a).

The Court in its opinion noted some of the inept procedure followed by this *in propria persona* litigant. (Opinion, p. 7.) Petitioner has struggled with this problem throughout the course of this protracted litigation. The dilemma now posed by the Rule 4(a)-type Notice of Appeal and the Rule 4(b)-type Notice to Prepare Reporter's Transcript (partial) is typical. Petitioner could not stand by without calling attention to this inconsistency in the trial court where it occurred. As stated in this Court's opinion, it is the duty of the trial court to supervise the preparation of the record or

appeal in the first instance. (Opinion, p. 8) But it is inaccurate, and would be misleading to the trial court upon reconsideration of this matter, to be governed by an opinion of this Court which characterizes petitioner's action as a failure to comply or an untimely compliance with Rule 4(b).

III.

Returning again to the Draftsman's Explanatory Notes on Rule 4(b), it should be observed that the quoted portion thereof appearing on page 6 of this Court's opinion commences with the following words:

> "The use of a partial, designated transcript, at the option of the appellant, permits a shortening of the record in cases *where the issues and evidence is readily severable.*" (Emphasis added.)

Kramer's untimely statement that upon appeal he intended to show "that the evidence presented by plaintiff's was adequate and sufficient to establish a *prima facie* case . . ." goes even further to take the matter out of the contemplation of Rule 4(b). Assuming *arguendo* that Kramer's statement amounts to an acceptable designation of a "point to be raised by him on the appeal", the point is self destructive of the 4(b) option in that *all* the issues and evidence must be reviewed for a proper determination of such a contention. This is analogous to a claim that there is not sufficient evidence to justify the decision. This is appellant's election in the first instance, and he is thereafter bound by the rule clearly stated in *Hankins v. Crumley* (1957),

152 Cal. App. 2d 64, 312 P. 2d 226 cited by this Court in its opinion at page 5. As stated in *Hankins*:

> "In opposition to the motion appellants say that the testimony ordered reported is all that there is upon the specific points they urge on appeal. This, however, doesn't satisfy the rule, and as the appeal is predicated upon the assertion that the evidence does not support the findings, it will be necessary for this Court to have the reporter's transcript all of the evidence in the case."

Should it be argued by appellant that he has stated a point on which the issues and evidence is readily severable in his tardy contention "that Section 631.8 was inapplicable and beyond the right of the trial court to consider because defendants had already introduced evidence on their behalf" (See Opinion herein, p. 4), respondent will stipulate to the pertinent facts and there will be no need for any portion of the reporter's transcript.

IV.

Since the opinion in this proceeding will govern the trial court in its supervision of the further proceedings ordered to be taken in the preparation of the record on appeal, said opinion should be modified in the following respects:

1. Omit any suggestion that any action was necessarily required of respondent under Rule 4(b), or that some excuse is called for in the record for respondent's not having taken action under Rule 4(b), or that the action taken by respondent was taken under Rule 4(b) after the time permitted by the rule.

2. Omit the limiting language of the opinion directing "the real parties in interest to file their amended notices to the clerk to prepare the clerk's and reporter's transcript in conformity with Rule 4, subdivision (b), California Rules of Court" (Opinion, p. 10), unless and until they have first complied with that portion of the Rule requiring that they state the points to be raised by them on the appeal.

3. Re-affirm the rule of *Hoskins v. Crumley* for the guidance of the lower court in determining that it will be appellant's duty to supply the reporter's transcript of all the evidence in the case in the event one of the points specified by appellants is predicated upon the assertion that the evidence does not support the judgment.

Wherefore, it is respectfully prayed that a rehearing be ordered in this matter and that the Opinion heretofore filed on May 16, 1969 and modified on May 20, 1969 be further modified in accordance with justice and the law.

Dated: May 27, 1969.

Respectfully submitted,

MUSSELL, MURPHY & HUGHES,
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Attorneys for Petitioner.

POST CARD

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Los Angeles, Cal. June 3, 19 59

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Peter Business Bureau, etc.
[redacted] No. 24813

RE COURT:
Petition for rehearing denied.

Chas Rosson, Clerk

B-11

2nd Civil No.
34013

In the Supreme Court of the State of California

BETTER BUSINESS BUREAU OF LOS ANGELES, LTD.,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent,

STANFORD H. BERMAN and DAVID KRAMER,
Real Parties in Interest.

PETITION FOR HEARING.

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In the Supreme Court of the State of California

BETTER BUSINESS BUREAU OF LOS ANGELES, LTD.,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent,

STANFORD H. BERMAN and DAVID KRAMER,
Real Parties in Interest.

PETITION FOR HEARING.

To the Honorable Roger J. Traynor, Chief Justice, and the Associate Justices of the Supreme Court of the State of California:

Pursuant to Rule 29(a), Rules on Appeal, the Better Business Bureau of Los Angeles, Ltd., a corporation, respectfully petitions this Honorable Court for a hearing in this case upon the grounds that a hearing is necessary to settle an important question of law as to the interpretation of Rule 4(b) of the Rules on Appeal and to secure uniformity of decisional law, the opinion of the District Court of Appeal being in conflict with *Estate of Wolper*, (1956) 146 Cal. App. 2d 249.

The decision of the District Court of Appeal was filed on the 16th day of May 1969; a Modification of Opinion (on identities of parties but not on matter of substance) was filed on May 20, 1969; a Petition for Rehearing was duly filed and this was denied on June 3, 1969. A copy of the opinion and modification is attached in the Appendix.

I.

An Important Question of Law.

Although the District Court of Appeal granted a Writ of Mandate, the opinion erroneously describes the procedures to be followed as being limited to those set out in Rule 4(b) of the Rules on Appeal.

The opinion at page 7 states:

> "Fairness to both the petitioner and real parties in interest, as well as the interests of justice, would be promoted by granting relief to the real parties in interest to file amended notices to the clerk to prepare the clerk's and reporter's transcript *conforming to the requirements of Rule 4, Subdivision (b)* and then have the respective parties pursue the preparation of the record in accordance with the rules on appeal. A writ of mandate directing the superior court to take proceedings appropriate to that end should be granted." (Emphasis added.)

Under Rule 4(b) where any portion of the testimony of a witness has been designated, the entire testimony of that witness is required to be designated *for* inclusion in the reporter's transcript. There has been no stipulation in this case that a portion of a witness's testimony can be used. Therefore, the appellants must be required to designate for transportation of the entire testimony of each witness, a portion of whose testimony they have previously designated for inclusion in the reporter's transcript.

If the real parties in interest pursue the same legal procedures pursuant to this opinion as they did in the past (and the opinion would stimulate them to do so)

then the petitioner will be in a worse legal position than it was before commencing the original motions in the Superior Court. The opinion of the District Court of Appeal is compounding the error made by the real parties in interest and the trial court. If the real parties in interest repeat the same points on appeal as they did in the past, the points will be as follows:

> "3. The appeal is based upon two points:
>
> (a) That the evidence presented by plaintiffs was adequate and sufficient to establish a prima facie case.
>
> (b) That Section 631.8 was inapplicable and beyond the right of the trial court to consider because defendants had already introduced evidence on their behalf."

(See Reply Brief of (Appellants) Real Parties in Interest to Petition for Writ of Mandamus, p. 6.)

To meet the issue,

> ". . . that the evidence presented by the plaintiffs was adequate and sufficient to establish a prima facie case . . ."

would require the petitioner to designate (and pay for the original and one copy) of the balance of the entire reporter's transcript. This imposes an improper burden upon the petitioner because of the erroneous statements contained in the opinion of the District Court of Appeal. The entire oral proceedings would be required to dispose of this inartfully stated issue. What the real parties in interest appear to be saying is that there was no substantial evidence to support the judgment entered pursuant to the motion made under the provisions of the Code of Civil Procedure 631.8. The opinion of the

District Court of Appeal has impliedly affirmed the position of the real parties in interest that this "prima facie" issue is proper within the framework of Rule 4(b). This position was clearly and explicitly set forth to the District Court of Appeal in the Reply Brief of the Appellants. The District Court of Appeal does not point out to the real parties in interest that such an issue cannot be raised under Rule 4(b), although there are two reasons; namely, (1) that this is not the legal test on appeal from a judgment entered upon the 631.8 motion; and

(2) that the test of any substantial evidence (to support the judgment) would have to be raised by proceedings under the provisions of Rule 4(a).

To the contrary, the Opinion of the District Court of Appeal condones and directs that future proceedings must be limited to Rule 4(b). The Court said at page 7,

> ". . . the interests of justice, . . . promoted by granting relief to the real parties in interest to file amended notices to the clerk to prepare the clerk's and reporter's transcript *conforming to the requirements of Rule 4, subdivision (b)* and then have the respective parties pursue the preparation of the record in accordance with the rules on appeal." (Emphasis added.)

This comment was made by the Court in the light of its earlier statement indicating that it had been the duty of the petitioner to have prepared and filed a notice counterdesignating the oral proceedings that it desired to have transcribed. This is the fundamental error of which petitioner complains. What the Dis-

trict Court of Appeal said in that regard is set forth at pages 2-3 of the Opinion as follows:

> "The notice to prepare the partial reporter's transcript was served on petitioner by mail on September 12, 1968, so it was incumbent upon petitioner to serve and file within ten days from September 13, 1968, (*footnote* 1) its notice counter-designating the oral proceedings it desired to have transcribed. There appears to be no such notice by petitioner as required by Rule 4 subdivision (b) in the trial court's files."

Upon this state of the record, the Superior Court would have no alternative under the present opinion but to limit the further preparation of the reporter's transcript under the provisions of Rule 4(b). The opinion would then impose upon petitioner the financial burden of producing the balance of the reporter's transcript of the oral proceedings or hazard the risk of the matter being presented on appeal from only a limited transcript and the criticism which might then be leveled upon it for having failed to comply with the provisions of the opinion which is under review. In this connection, petitioner wishes to point out that in the initial proceedings, it was under no duty to bring the motion which it brought seeking clarification in the trial court and petitioner could, at that time, have simply relied upon the cases of *Kaufman v. Brown*, 106 Cal. App. 2d 686 and *Swails v. General Electric Co.*, 264 A.C.A. 100. Had petitioner not been dealing with a plaintiff in *propria persona* it would have taken no action and would have let the appellant assume the responsibility of the improper and inadequately prepared notices both for the clerk and reporter's transcript. It was only in an abun-

dance of caution that petitioner sought the relief and intervention of the Superior Court in the first instance. Since that time the legal situation for petitioner has continually worsened, resulting in this inaccurate opinion of the District Court of Appeal which the petitioner seeks to have reviewed in this Court.

II.

Uniformity of Decisional Law.

The District Court of Appeal relies upon the *Estate of Wolper*, (1956) 146 Cal. App. 2d 249 (see Opinion, pp. 4 and 5 for the proposition that some mandatory action was required of petitioner in compliance with Rule 4(b). The Court then proceeds to comment that petitioner should have proceeded under Rule 4(b) and designated the balance of the reporter's transcript not designated by the real parties in interest. The District Court opinion at pages 4-5 states:

> "There is, of course, no excuse in the record before us for petitioner not taking the remedial measure provided for its benefit under Rule 4 subdivision (b). . . . Thus, if the respondent desires a complete transcript, he may designate the balance of the record, subject only to a possible penalty under Rule 26 (a) for bringing up unnecessary record in bad faith."

The District Court of Appeal misapplied the rule in *Wolper*. That case had under consideration rules on appeal *other than* Rule 4(b), under which the District Court of Appeal suggests that the respondent should

have acted. The rules alluded to in *Wolper* were Rule 4(a), 4(c), 5(c), 7(a) and Rule 10. Each of these rules were mandatory and contained such language as:

> 4(a) ". . . *shall* serve . . . within 10 days . . . a notice to prepare a reporter's transcript . . ."
>
> 4(c) ". . . notice *shall* not be effective . . . unless, within 10 days . . . appellant *shall* deposit or file. . . ."
>
> 5(c) ". . . notice *shall* not be effective . . . unless, within 10 days . . . appellant *shall* make arrangements . . ."
>
> 7(a) ". . . appellant *shall* serve and file a notice so stating within 10 days . . ."
>
> ". . . within 30 days thereafter the appellant *shall* serve and file a condensed statement . . ."
>
> ". . . appellant *shall* state the points to be raised by him on appeal . . ."
>
> 10 ". . . clerk . . . *shall* notify the appellant that the filing fee shall be paid within 20 days. . . ."
>
> "After the expiration of such 20-day period the clerk *shall* not permit the filing of the record. . . ."

The *Wolper* case does not mention Rule 4(b), the language of which is permissive and not mandatory. This was brought to the attention of the District Court of Appeal in the Petition for Rehearing (see p. 3).

III.

Conclusion.

The opinion of the District Court of Appeal at page 7 ordered as follows:

> "Let a peremptory writ of mandamus issue directing the superior court to issue appropriate orders to the real parties in interest to file amended notices to the clerk to prepare the clerk's and reporter's transcript in conformity with Rule 4, subdivision (b), California Rules of Court. . . ."

The further proceedings in this case should not be limited to Rule 4, subdivision (b), and herein lies the error. This can readily be corrected by the opinion of this Court directing that further proceedings shall be had pursuant to both Rules 4(a) and 4(b) on appeal and such other appropriate rules that govern the preparation of the record on appeal. The real parties in interest should have the guidance of this Court so that they will be informed that the proposed point "that the evidence presented by plaintiffs was adequate and sufficient to establish a prima facie case" cannot be raised under Rule 4, subdivision (b) and if the substantial evidence rule is to be invoked, it will be necessary to present all of the oral proceedings under Rule 4(a) in order to determine such an issue on appeal. It appears that further guidance should be given by this Court in pointing out to the real parties in interest that their other point, "that Section 631.8 was inapplicable and beyond the right of the trial court to consider because the defendants had already introduced evidence on their behalf" can be determined without reference to any portion of the reporter's transcript, but

simply from the clerk's transcript which would be sufficient to establish that the witness (David Keklikian) had testified on behalf of the defendants having been called out of order with the permission of the trial judge.

Wherefore, petitioner respectfully submits that this Petition for Hearing should be granted and that this cause be set for argument thereon.

Dated this 24th day of June, 1969.

MESERVE, MUMPER & HUGHES,
By DOWNEY A. GROSENBAUGH,
Attorneys for Petitioner.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent.	2d Civ. No. 34013 PEREMPTORY WRIT OF MANDATE
STANFORD H. BERMAN and DAVID KRAMER, Real Parties in Interest.	

MESERVE, MUMPER & HUGHES
612 South Flower Street
Los Angeles, California 90017

Telephone: 620-0300

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent.	2d Civ. No. 34013 PEREMPTORY WRIT OF MANDATE
STANFORD H. BERMAN and DAVID KRAMER, Real Parties in Interest.	

THE PEOPLE OF THE STATE OF CALIFORNIA, TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, GREETINGS:

Whereas, petitioner served and filed herein his duly verified petition for a writ of mandate, and an alternative writ of mandate issued herein on the 30th day of January, 1969 and a hearing was held herein on April 11, 1969; and

Whereas, it appears to this court that a peremptory writ of mandate should issue herein and that petitioner has no other plain, speedy and adequate remedy in the ordinary course of law;

Now, therefore, you, THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, are commanded

mediately after receipt of this writ:

(a) To vacate the order made on October 16, 1968 nying motion of defendant and respondent Better Business reau of Los Angeles, Ltd.;

(b) To issue appropriate orders to the Real Parties in terest to file amended notices to the Clerk to prepare e Clerk's and Reporter's Transcripts in conformity with le 4, subdivision (b), California Rules of Court, within n days from the date of such order;

(c) To thereafter issue such further orders to the spective parties so that they shall pursue the further eparation of the record on appeal in conformity with the les of court governing preparation of such records.

WITNESS the Honorable Otto M. Kaus, Presiding Justice Division Five of the Court of Appeal of the State of lifornia, Second Appellate District.

ATTEST my hand and seal of this Court, this 21 day July, 1969.

CLAY ROBBINS, JR., CLERK

By H. P. LAY
Deputy Clerk

Due service of the foregoing peremptory writ, and receipt of a copy thereof, is hereby acknowledged this 31 day of July, 1969.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES

By s/ Joseph A. Wapner
Presiding Judge

Due service of the foregoing peremptory writ, and receipt of a copy thereof, is hereby acknowledged this 31st day of July, 1969.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES - DEPARTMENT 66

By s/ Jessee A. Stephens
Clerk

APPENDIX E

DAVID KRAMER and
STANFORD H. BERMAN
3921 West Jefferson Boulevard
Los Angeles, California 90016

RE 1-8761

Attorneys in Pro Per

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

STANFORD H. BERMAN, et al., Plaintiffs, vs. BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., et al., Defendants.	No. 812 684 AMENDED NOTICE TO PREPARE REPORTER'S TRANSCRIPT

NOTICE IS GIVEN that plaintiffs and appellants desire the preparation of a reporter's transcript of the oral proceedings in this action, only to the following oral testimony at the trial:

1. The stipulation entered into by the parties on the 5th day of February, 1968.

2. Stipulation entered into by all of the parties with reference to the 1957-1963 Sears comparative price policy in retail advertising.

3. Stipulation entered into by all of the parties with reference to the Better Business Bureau policy on comparative price retail advertising concerning the aluminum awning companies operating on a par deal basis.

4. All of the oral testimony of witness David Ross. This has already been ordered from the court reporter, paid for by appellants, and is in process of completion.

5. All of the oral testimony of the following witnesses, which oral testimony has already been transcribed by the court reporter, paid for by appellants, and completed, the originals of which are already in the possession of the official court reporter who took the testimony:

(a) Ralph Denning;

(b) Seymour N. Sutter;

(c) Mark Zucker, Sr.;

(d) Mark Zucker, Jr.;

(e) James B. Williams;

(f) Elmer LePon;

(g) Raymond L. Kokkelenberg;

(h) Benjamin Nissen;

(i) Don Ashby;

(j) Douglas J. Kamp;

(k) Marvin Reimer;

(l) Roy F. Walker;

(m) Argument of David Kramer.

DATED: August 28, 1969.

/s/ David Kramer

/s/ Stanford H. Berman

(PROOF OF SERVICE BY MAIL -- 1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 3407 West Sixth Street, Suite 801, Los Angeles, California 90005. On September 3, 1969, I served the within Amended Notice to Prepare Reporter's Transcript on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles address as follows:

Clerk of Superior Court, 111 North Hill Street,
Los Angeles, California
D. Grosenbaugh c/o Meserve, Mumper & Hughes
612 South Flower, Suite 500, Los Angeles, California 90007
Robert Keller, Esq., 615 South Flower, Suite 604,
Los Angeles, California
Wheeler, McCue & Knox, 2650 E. Olympic,
Los Angeles, California 90054

I certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

Executed on September 3, 1969, at Los Angeles, California

Barbara S. Tanezaki

*Both the verification and proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

DAVID KRAMER
3921 West Jefferson Boulevard
Los Angeles, California 90016

RE. 1-8761

In Pro Per

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

STANFORD H. BERMAN and DAVID KRAMER db under the Firm name LIFETIME AWNING CO., Plaintiffs, vs. BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., OLIN H. STAPP, AIR VENT AWNING CO., a corporation, AIRFLO AWNING COMPANY, a corporation, SEARS ROEBUCK & COMPANY, a corporation, HEARST PUBLISHING CO., INC., a corporation, and TIMES MIRROR CO., a corporation, Defendants.	NO. 812,684 NOTICE TO CORRECT AND TO SUPPLEMENT REPORTER'S TRANSCRIPT

TO: WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court:

PLEASE TAKE NOTICE that the Reporter's Transcript on appeal is incomplete and requires correction and supplementation in that the Reporter's Transcript fails to and does not include the testimony of JOHN R. O'HARE, taken in court on February 14, 1968.

Please correct and supplement the Reporter's Transcript by adding thereto the transcript of the testimony of JOHN R. O'HARE, who testified in the above-entitled matter on February 14, 1968. The transcript of the testimony of JOHN R. O'HARE was originally requested and prepared for the original appeal but inadvertently

. ommitted in the request for the amended transcript.

DATED: November 11, 1969.

DAVID KRAMER, In Pro Per

(PROOF OF SERVICE BY MAIL -- 1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 3407 W. Sixth Street, Suite 801, Los Angeles, California 90005. On November 11, 1969, I served the within Notice to Correct and to Supplement Reporter's Transcript on the defendants in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles addressed as follows:

Meserve, Mumper & Hughes - 612 S. Flower St. Los Angeles, Calif. 90017
Wheeler, McCue & Morris - 2650 E. Olympic Blvd., Los Angeles, Calif. 90023
Robert A. Keller - 612 S. Flower St., Los Angeles, Calif. 90017

I certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

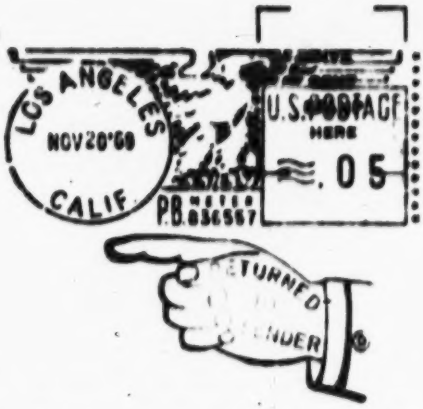
Executed on November 11, 1969, at Los Angeles, California.

Barbara S. Tanezaki

*Both the verification and proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

APPENDIX F

POST CARD



CLERK'S OFFICE
Court of Appeal
SECOND DISTRICT

CALIFORNIA STATE BUILDING, ROOM 1201
CIVIC CENTER
LOS ANGELES, CALIF. 90012

David Kramer

3921 West Jefferson Blvd.

Los Angeles, , California

Los Angeles, Cal. NOV 26 1969 , 19

TITLE { WOMEN RIGHTS BUREAU OF L.A. / SUPERIOR COURT, L.A. CO., } Civil No. 69-18[illegible]

THE COURT: Application for order allowing and directing Superior Court Clerk to transmit and file part of record on appeal denied without prejudice.

CLAY ROBBINS, *Clerk*

F-1

APPENDIX G

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DAVID KRAMER, et al Plaintiff vs THE BETTER BUSINESS BUREAU Defendant	No. C-812 684 CERTIFICATE RE MISSING EXHIBITS

I, WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court for the County and State aforesaid, do hereby certify that the exhibits in the above entitled action were charged to Superior Court Reporter Popkin Simonian (Department 51) on July 8, 1969, for preparation of an appeal transcript. In December 1969, when Mr. Simonian was transferring to Pasadena, he arranged with the Courtroom Bailiff, Roy Belyea, to return the exhibits to the Exhibit Room. Mr. Belyea states that he returned them, however, the Clerk has no recollection of receiving them, and Mr. Simonian's "charge-out" card is still in place.

There has been a complete and comprehensive search of Courtroom, Exhibit Room, and all areas of the Clerk's Office where these records could conceivably be, and they have not been found. At this point, it appears that further search would not be productive.

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles

BY W. B. Fox
W. B. Fox

APPENDIX H

2nd Civil No. 36226

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DAVID KRAMER and STANFORD H. BERMAN, Plaintiffs and Appellants, v. BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., a corporation, OLIN H. STAPP, an individual, AIR-VENT (Aluminum) AWNING CO., a corporation, and SEARS ROEBUCK and CO., a corporation, Defendants and Respondents.	)

NOTICE OF MOTION TO STRIKE POINT ON APPEAL AND DISMISS APPEAL AS TO SAID POINT; SUPPORTING DECLARATION; and POINTS AND AUTHORITIES IN SUPPORT THEREOF

MESERVE, MUMPER & HUGHES
612 South Flower Street
Los Angeles, California 90017
Telephone: 620-0300

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DAVID KRAMER, et al., Plaintiffs and Appellants, v. BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., et al., Defendants and Respondents.	2d Civil No. 36226 NOTICE OF MOTION TO STRIKE POINT ON APPEAL AND DISMIS APPEAL AS TO SAID POINT; SUPPORTING DECLARATION; an POINTS AND AUTHORITIES IN SUPPORT THEREOF

TO SANFORD H. BERMAN AND DAVID KRAMER, APPELLANTS IN PROPRIA PERSONAM:

PLEASE TAKE NOTICE that on July 9, 1970 at 9:30 o'clock a.m., or as soon thereafter as the matter can be heard, the respondent, BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., will move the Court of Appeal of the State of California, Second Appellant District, in Division Two, or in such other division as may be ordered, in the courtroom located on the Eleventh Floor of the State Building, 217 West First Street, Los Angeles, California, for an order striking from appellants' Amended Notice of Appeal the following point to be raised by appellants on appeal, and to dismiss the appeal as to said point:

"(1) That the evidence presented by plaintiffs was adequate and sufficient to establish a prima

"facie case; . . . " (See Appellants' Amended Notice of Appeal, lines 25 and 26.)

Said motion will be based on the grounds that:

1. Point (1) of appellants' Amended Notice of Appeal above-quoted does not state a valid ground of appeal.

2. Appellant has not provided the entire record of oral proceedings and accordingly has not produced a record which may be accepted as complete under the Rules on Appeal.

This motion will be based upon this notice, the declaration of Downey A. Grosenbaugh, the memorandum of points and authorities filed in support hereof, and the record on appeal.

Dated: May 25, 1970.

MESERVE, MUMPER & HUGHES

By DOWNEY A. GROSENBAUGH
Downey A. Grosenbaugh

Attorneys for Respondent

POINTS AND AUTHORITIES

I

POINT (1) OF APPELLANTS' AMENDED NOTICE OF APPEAL DOES NOT STATE A VALID GROUND OF APPEAL.

A. Appellant in his Amended Notice of Appeal has stated as his first ground of appeal the following:

> "(1) That the evidence presented by plaintiffs was adequate and sufficient to establish a prima facie case; . . ."

The prima facie rule is not the test applied by the reviewing court in considering whether or not a judgment should have been entered pursuant to a motion under California Code of Civil Procedure, section 631.8.

B. Where judgment has been entered for the defendant, pursuant to a motion under California Code of Civil Procedure, section 631.8, the appellate court, upon review, applies the "substantial evidence rule," giving the evidence all inferences favoring the defendant which are reasonably permissible and looks only to determine whether or not there is substantial evidence to support the judgment, which is evidence of ponderable legal significance and reasonably to be believed.

Pacific Western Oil Co. v. Bonline,

220 Cal.App.2d 325 at 329;

Mountain v. Financial Indemnity Co.,

223 Cal.App.2d 334 at 337;

R. E. Industries Inc. v. Valenta,

270 Cal.App.2d 550 at 554; and

Bowman v. General Air Conditioning Corp.,

233 Cal.App.2d 343 at 350.

C. Assuming for the sake of argument "that the evidence presented by plaintiffs was adequate and sufficient to establish a prima facie case", under the new Evidence Code, this is not the equivalent of maintaining their "burden of proof."

10 Cal.Jur.2d Rev. 514.

1. Under the Evidence Code a party has the burden of proof as to each fact, the existence or non-existence of which is essential to the claim for relief that he is asserting.

Evid. Code, Section 500.

2. In civil cases the burden of proof requires proof by a preponderance of the evidence.

Evid. Code, Section 115.

3. The establishing of a "prima facie case" does not shift the burden of proof or necessarily mean that the judgment goes in favor of plaintiff as a matter of law. The new motion-for-judgment procedure requires the trial judge

to weigh the evidence. As stated in Browning v. General Air Conditioning Corp., supra:

> "In weighing the evidence, the trial judge may exercise the prerogatives of a fact trier by refusing to believe witnesses and by drawing conclusions at odds with expert opinion. If the motion is granted, his findings are entitled to the same respect on appeal as any other findings and are not reversible if supported by substantial evidence. (Citing cases.)"

4. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

Browning v. General Air Conditioning Corp., 233 Cal.App.2d 545 at 551.

II

APPELLANT HAS NOT PROVIDED THE REVIEWING COURT WITH A RECORD WHICH MAY BE ACCEPTED AS COMPLETE UNDER THE RULES ON APPEAL.

A. Appellants' Amended Notice to Prepare Reporter's

Transcript on file herein designates the oral testimony of the following witnesses only to be transcribed for the record on appeal:

David Rose;

Ralph Dunning;

Seymour H. Sutter;

Mark Escher, Sr.;

Mark Escher, Jr.;

James B. Williams;

Elmer LaFon;

Raymond L. Rehbolenberg;

Benjamin Hixson;

Don Ashby;

Douglas J. Kemp;

Marvin Reimer; and

Ray P. Walker.

By order of the trial court below dated November 25, 1969, the Reporter's Transcript was ordered supplemented by adding thereto the testimony of witness John R. O'Hare.

As shown by the declaration of Denney A. Greenbaugh attached hereto and by this reference made a part hereof, the testimony of these fourteen (14) witnesses above named whose oral testimony appellant has designated for transcription, extended over approximately thirty-four (34) trial days. Said declaration of Denney A. Greenbaugh further shows that, in addition to said witnesses, there were

twenty-five (25) other persons who testified at the trial; and their testimony extended over an additional approximately seventy-four (74) days of trial.

In ordering the preparation of only a portion of the oral testimony, appellant is apparently proceeding under Appellate Rule 4(b) of the California Rules of Court, which provides, in part, as follows:

> ". . . If the appellant, in his notice to the clerk, states the points to be raised by him on the appeal, he may designate the portions of the oral proceedings to be transcribed, or direct the omission of any portions which he deems unnecessary. . . ."

B. Assuming ~~arguendo~~ that appellant's point "that the evidence presented by plaintiff was inadequate and sufficient to establish a prima facie case" is a valid "point to be raised by him on the appeal" as called for by Rule 4(b), it is nevertheless not such a point as will be considered by the Appellate Court on a partial transcript of the testimony.

1. As previously stated, the motion-for-judgment procedure set up by the Code of Civil Procedure, section 631.8 requires the trial judge to weigh the evidence, which in turn calls for the application of the substantial

evidence rule on appeal from a judgment granted under said code section.

Greening v. General Air Conditioning Corp.,
233 Cal.App.2d 545 at 550;
Bernstein v. Financial Indemnity Co.,
263 Cal.App.2d 324 at 327; and
France Western Oil Co. v. Farias,
259 Cal.App.2d 325 at 329.

2. Since the findings upon which the judgment herein was rendered were based on the plaintiffs' (appellants') evidence alone, this reviewing court cannot apply the substantial evidence rule with somewhat less than half the total testimony before it.

a. Among other things, the application of the substantial evidence rule requires the reviewing court to give to the evidence all inferences favoring the defendant reasonably possible.

France Western Oil Co. v. Farias,
supra at 329.

b. Such a partial transcript denies this court the opportunity to make any such inferences as to more than half of the total testimony, whereas the statute under which the motion for judgment was granted charges the trial judge with the duty to have weighed all that evidence and drew from any of it such inferences as seem reasonable to him.

c. Furthermore, the evidence to be substantial must be evidence which is of ponderable legal significance and reasonably to be believed.

France Western Oil Co. v. Farina, supra at 329.

d. Without the full record before it, this reviewing court cannot pass judgment on the legal significance or believability of the evidence on which the trial court may have based its findings, nor can it pass on the reasonableness of every inference favorable to the defendant which the trial court may have drawn in ruling on the motion for judgment. As stated in Hopkins v. Crumley, 152 Cal.App. 2d 64, 65:

> ". . . as the appeal is predicated upon the assertion that the evidence does not support the findings, it will be necessary for this court to have the reporter's transcript of all the evidence in the case."

C. A motion to strike or for dismissal of the appeal has been indicated to be the appropriate remedy, and such relief has been granted in cases where appellant has failed to provide a complete record on appeal.

Smith v. General Electric Co., 264 Cal.App.2d 82 at 84;

Renfroe v. Brown,

186 Cal.App.2d 686;

Hopkins v. Crowley,

152 Cal.App.2d 64, 65; and

See also Hooper v. Byron Jackson Pumps, Inc.,

186 Cal.App.2d 651, 652.

It should be noted however, that in furtherance of the policy of our law to favor if possible hearings on appeal upon their merits, the Hopkins case afforded the appellants an opportunity to avoid dismissal if within ten (10) days they made arrangements with and compensated the court reporter for the preparation of a transcript containing all of the testimony not transcribed in the partial transcript originally filed.

Hopkins v. Crowley,

152 Cal.App.2d 64 at 66.

Dated: May 25, 1970.

Respectfully submitted,

HERSHEY, HOOPER & HUGHES

By DOWNEY A. GROSSENBAUGH
Downey A. Grossenbaugh

Attorneys for Respondent

DECLARATION

ROBERT A. GROSSMANN declares:

I am the attorney for respondent, BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., in subject action and was continuously present and represented said BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., during the trial of said action in Department 51 of the Superior Court of the State of California for the County of Los Angeles.

During the entire course of said trial, defendants caused a summary record of the proceedings and testimony to be taken down and transcribed daily by private stenographers present at all times in court for the purpose. Those records indicate that the witnesses named in appellant's Amended Notice to Prepare Reporter's Transcript and the Order of Department 51 of said Sperior Court supplementing said transcript, testified in said trial on the dates indicated opposite their names:

1.	Mark Zucker	January 3, 1968
		January 4, 1968
2.	Mark Zucker, Jr.	January 4, 1968
3.	James D. Williams	January 8, 1968
4.	Elmer LaPon	January 8, 1968
		January 9, 1968
5.	John R. O'Hare	January 25, 1968
		February 14, 1968

6.	Raymond Kohlenberg	January 26, 1968
		January 29, 1968
		January 30, 1968
		January 31, 1968
7.	Benjamin Bloom	January 31, 1968
		February 1, 1968
		February 2, 1968
8.	Roy F. Walker	February 7, 1968
9.	Don Ashby	February 7, 1968
10.	Marvin W. Reimer	February 8, 1968
11.	Douglas J. Kemp	February 8, 1968
		February 13, 1968
12.	David Ross	April 9, 1968
		April 10, 1968
		April 11, 1968
		April 12, 1968
		April 15, 1968
		April 16, 1968
		April 17, 1968
		April 18, 1968
		April 19, 1968
		April 22, 1968
		April 23, 1968
		April 24, 1968
		April 25, 1968
		April 26, 1968

		April 29, 1968
		April 30, 1968
13.	Ralph Saundi	May 1, 1968
14.	Seymour H. Sutter	May 8, 1968
		May 9, 1968
		May 10, 1968

Said record further indicates that, in addition to the above named witnesses, the following witnesses testified in said trial on the dates set opposite their names; but none of their testimony has been requested by appellants to be transcribed, and none of said testimony has been included in the Reporter's Transcript on appeal herein:

1.		December 6, 1967
		December 7, 1967
		December 8, 1967
2.	Helen Zellner	December 11, 1967
		December 12, 1967
		May 6, 1968
3.	John P. Vain	December 12, 1967
4.	George Zajicek	December 12, 1967
		December 13, 1967
		December 14, 1967
		December 15, 1967
		December 18, 1967
5.	Bertram Hayman	December 18, 1967
		December 19, 1967

6.	Robert J. Bauer	December 20, 1967
		December 21, 1967
		December 27, 1967
		December 28, 1967
		January 4, 1968
		January 5, 1968
		January 9, 1968
		January 10, 1968
		January 15, 1968
		January 16, 1968
		January 17, 1968
		January 18, 1968
		February 6, 1968
		February 7, 1968
		February 15, 1968
		February 16, 1968
		February 19, 1968
		February 20, 1968
		March 4, 1968
7.	Allan Kramer	January 9, 1968
8.	Robert Sample	January 10, 1968
		January 11, 1968
		January 12, 1968
		January 15, 1968
9.	Joseph Sadacca	January 22, 1968

10.	Ted Gerber	January 22, 1968
		January 23, 1968
		January 24, 1968
11.	Ralph Fleming	January 24, 1968
12.	Richard E. Meriwether	January 24, 1968
		January 25, 1968
13.	Eugene A. Mulligan	January 25, 1968
14.	John C. Love	January 31, 1968
15.	Gilbert Dunsyer	February 5, 1968
		February 6, 1968
16.	Saul Kimmel	February 6, 1968
17.	Warren S. Hagwood	February 13, 1968
18.	Sanford Steinberg	February 13, 1968
		February 14, 1 968
19.	Robert Fogle	February 15, 1968
20.	Olin H. Stapp	March 4, 1968
		March 5, 1968
		March 6, 1968
		March 7, 1968
		March 8, 1968
		March 11, 1968
		March 12, 1968
		March 13, 1968
		March 14, 1968
		March 15, 1968

21.	David Kramer	March 18, 1968
		March 19, 1968
		March 20, 1968
		March 21, 1968
		March 22, 1968
		March 25, 1968
		March 26, 1968
		March 27, 1968
		March 28, 1968
		March 29, 1968
		April 1, 1968
		April 2, 1968
		April 3, 1968
		April 4, 1968
		April 5, 1968
		April 8, 1968
		April 9, 1968
		May 1, 1968
		May 2, 1968
		May 3, 1968
		May 6, 1968
		May 7, 1968
22.	Ann Beck	April 1, 1968
23.	Lloyd Bass	April 3, 1968
24.	Alvin R. Isenberg	May 6, 1968

25. Carl Hiscoer May 7, 1968

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on May 25, 1970 at Los Angeles, California.

DOWNEY A. GROSSENBAUGH
Downey A. Grossenbaugh

(PROOF OF SERVICE BY MAIL-1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within above entitled action; my business address is: c/o Meserve, Mumper & Hughes, Suite 500, 612 South Flower Street, Los Angeles, California 90017.

On May 27, 1970, I served the within NOTICE OF MOTION TO STRIKE POINT ON APPEAL AND DISMISS APPEAL AS TO SAID POINT; SUPPORTING DECLARATION; and POINTS AND AUTHORITIES IN SUPPORT THEREOF, on the plaintiffs and appellants in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at 612 South Flower Street, Los Angeles, California 90017, addressed as follows:

Mr. David Kramer
3921 W. Jefferson Blvd.
Los Angeles, Calif. 90016

Mr. Stanford H. Berman
3921 W. Jefferson Blvd.
Los Angeles, Calif. 90016

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 27, 1970, at Los Angeles, California.

BARBARA GORDEN
Barbara Gorden

APPENDIX I

2nd Civil No. 36226

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DAVID KRAMER, et al.,

Plaintiffs and Appellants,

vs.

BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., et al.,

Defendants and Respondents.

FILED June 9, 1970
Clerk's Office, Court of Appeal
Second Appellate District

POINTS AND AUTHORITIES

IN OPPOSITION TO MOTION TO STRIKE POINT ON APPEAL AND DISMISS APPEAL AS TO SAID POINT

DAVID KRAMER, In Propria Personæ, Plaintiff and Appellant

3021 West Jefferson Boulevard
Los Angeles, California 90016

RE. 1-8761

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DAVID KRAMER, et al., Plaintiffs and Appellants, vs. BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., et al., Defendants and Respondents.	2nd Civil No. 36226 POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO STRIKE POINT ON APPEAL AND DISMISS APPEAL AS TO SAID POINT

POINTS AND AUTHORITIES

I

POINT I OF RESPONDENTS' POINTS AND AUTHORITIES IGNORES FACT THAT RESPONDENTS ADDUCED EVIDENCE OF THEIR OWN BEHALF.

A. Whether appellant refers to "prima facie case" or otherwise, is not the true test of the matter before the court. The fact remains, notwithstanding respondents' argument and citation of authorities, that appellant did establish, by substantial proof, a case in his own behalf. Following the presentation of appellant's case, respondents chose to introduce evidence on their own behalf.

Although it is true, that under Section 631.8 of the Code of Civil Procedure, the court may approve findings "as though made after a trial in which evidence was produced by both sides", Section 631.8 contemplates a procedure whereby the ruling is actually based upon plaintiff's case alone. A very recent case, Charles C. Chapman

Building Co. vs. California Mart, in 2 CA 3rd 846, contains the foregoing excerpt. The inescapable inference is that the court's findings follow only the plaintiff's presentation and exclude any case made by defendants. Were it otherwise, the plaintiff undoubtedly should and would have an opportunity to meet and contest any evidence presented by defendant, by way of rebuttal.

In the instance case, no such opportunity was allowed or granted plaintiff. Although defendants elected to treat the case made by appellant as vulnerable to an attack under Section 631.8, defendants nevertheless presented their own case by way and in the course of the defense. At this point, consequently, appellant should have been given an opportunity to proceed in rebuttal and not be denied the further right of due process following the presentation of the defense case.

B. Regardless of the nomenclature used by appellant, "prima facie case" or otherwise, appellant should not be denied his right of appeal. Appellant is now in the process of preparing his Opening Brief, and the instant motion of respondents is both belated and untimely. This Honorable Court should not allow respondents at this late date in these proceedings to attack appellant's right to continue with his appeal.

II

THE PRESENT RECORD IS SUFFICIENT IN THE CIRCUMSTANCES OF THIS CASE.

A. Respondents have previously attacked the record under which appellant is proceeding. This Honorable Court in its opinion filed on May 10, 1969, ordered the Superior Court to proceed with

the preparation of the record as therein indicated. The Superior Court on August 26, 1969, made its order pursuant to the order of this Honorable Court. Following these orders, and further augmentation of the record, the parties have been proceeding in the course of this appeal. As indicated in Point I, of this Memorandum, respondents now, both after the opinion of this Honorable Court, the ruling of the Superior Court, the filing of the record, and the enormous amount of work appellant has already devoted to the preparation of his Opening Brief, belatedly come before this court in an effort to accomplish the same result which has already been passed upon by this Honorable Court and reject. It would be an unnecessary waste of time of both this Honorable Court and all parties involved for appellant to restate his position with reference to this record, the position having already been stated and restated on several occasions. For respondents to relitigate this same issue at this late date is almost tantamount to a frivolous proceeding.

DATED: June 8, 1970.

DAVID KRAMER
In Pro Per

(PROOF OF SERVICE BY MAIL-1013a, 2013.5.C.C.P.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 3407 West Sixth Street, Suite 801, Los Angeles, California 90005.

On June 8, 1970, I served the within Points and Authorities in Opposition to Motion to Strike Point on Appeal and Dismiss Appeal as to Said Point, on the defendants in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, addressed as follows:

Meserve, Mumper & Hughes
612 South Flower Street
Los Angeles, California 90017

Wheeler, McCue & Morris
2650 E. Olympic Boulevard
Los Angeles, California 90023

Robert A. Keller, Esq.
612 South Flower Street
Los Angeles, California 90017

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 8, 1970, at Los Angeles, California.

BARBARA S. TANEZAKI

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DAVID KRAMER, et al., Plaintiffs and Appellants, vs. BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., et al., Defendants and Respondents.	2nd Civil No. 36226 APPLICATION FOR EXTENSION OF TIME TO FILE RESPONDENT'S BRIEF and ORDER

The undersigned Downey A. Grosenbaugh declares that:

1. I am the attorney representing the defendant and respondent Better Business Bureau of Los Angeles, Ltd. I make this application in behalf of my client and in behalf of the other respondents who join in this application by their attorneys, whose signatures are affixed hereto.

2. On July 9, 1970 at 9:30 A.M. a motion is set for hearing before this honorable Court to strike one of the appellants' points on appeal and to dismiss the appeal as to that point. (See Notice of Motion to Strike Point on Appeal and Dismiss Appeal as to Said Point; Supporting Declaration; and Points and Authorities in Support Thereof, filed on May 27, 1970.)

3. The appellants' opening brief was personally served upon all of the undersigned on or about June 11, 1970, thus requiring the respondents' briefs to be filed on or about July 13, 1970.

4. The content of the respondents' briefs will depend upon the ruling made on the pending motion.

WHEREFORE, the undersigned respectfully request that this

Court grant at least a 30-day extension of time for the respondents to file their reply briefs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California, this 1st day of July 1970.

/s/ Downey A. Grosenbaugh
Downey A. Grosenbaugh
Attorney for Defendant
Better Business Bureau of Los Angeles, Ltd.

The undersigned join in the foregoing application.

/s/ Robert A. Keller
Robert A. Keller
Attorney for Defendant Air-Vent Aluminum Awning Co.

/s/ John J. McCue
John J. McCue
Attorney for Defendant Sears, Roebuck and Co.

ORDER

For good cause shown, IT IS ORDERED that the time to file and serve the respondents' reply briefs is extended to 7/11 1970.

Dated this 6 day of July 1970.

/s/ Herndon
Presiding Justice
Acting

(PROOF OF SERVICE BY MAIL-1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within above entitled action; my business address is: c/o Meserve, Mumper & Hughes, Suite 500, 612 South Flower Street, Los Angeles, California 90017.

On July 6, 1970, I served the within APPLICATION FOR EXTENSION OF TIME TO FILE RESPONDENT'S BRIEF AND ORDER, on the plaintiffs and appellants in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at 612 South Flower Street, Los Angeles, California 90017, addressed as follows:

Mr. David Kramer
3921 W. Jefferson Blvd.
Los Angeles, California 90016

Mr. Stanford H. Berman
3921 W. Jefferson Blvd.
Los Angeles, Calif. 90016

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 6, 1970, at Los Angeles, California.

JEANNE B. MILLER
Jeanne B. Miller

A complete listing of the Board of Directors of the CITY NATIONAL BANK as shown on their brochure of June 30, 1970, present:

"JOSEPH BANDLER Investments

LOUIS C. BLAU Attorney at Law

ISADORE FAMILIAN President
Price-Pfister Brass Mfg. Co.

MARTIN GANG Attorney at Law
Gang, Tyre & Brown

BRAM GOLDSMITH President
Buckeye Realty & Management Corp.

ARMAND HAMMER President
Occidental Petroleum Corporation

ALFRED HART, Chairman of the Board

EUGENE V. KLEIN Chairman
National General Corporation

CHESTER I. LAPPEN Attorney at Law
Mitchell, Silberberg & Knupp

SID B. LEVINE Partner
Royal Investment Company

WILLIAM L. OLSEN Executive Vice President

CURTIS H. PALMER President

JOHN J. POLLON Vice President-Director
Amana Refrigeration, Inc.

MARCUS H. RABWIN, M.D. Surgeon

LESTER WM. ROTH Investments

H. W. SALL President
Western Non-Ferrous Metals Corp

MARK S. SCHULMAN President
Marks Security Corporation"

APPENDIX L

2d Civil 36336

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DAVID KRAMER and STANFORD H. BERMAN,

Plaintiffs and Appellants,

v.

BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., a corporation, OLIN H. STAPP, an individual, AIR-VENT (Aluminum) AWNING CO., a corporation, and SEARS ROEBUCK AND CO., a corporation,

Defendants and Respondents.

REPORTER'S TRANSCRIPT OF ORAL ARGUMENT

July 9, 1970

APPEARANCES:

For Plaintiff and Appellant:

DAVID KRAMER, in Propria Personae
3021 West Jefferson Boulevard
Los Angeles, California 90016
Telephone: RE 1-8761

For Defendant and Respondent Better Business Bureau of Los Angeles, Ltd.:

MESERVE, MUMPER & HUGHES
By DOWNEY A. GROSENBAUGH
612 South Flower Street
Los Angeles, California 90017
Telephone: 620-0300

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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DAVID KRAMER and STANFORD H. BERMAN, Plaintiffs and Appellants, v. BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., a corporation, OLIN H. STAPP, an individual, AIR-VENT (Aluminum) AWNING CO., a corporation, and SEARS ROEBUCK AND CO., a corporation, Defendants and Respondents.	2d Civ. 36226

REPORTER'S TRANSCRIPT OF ORAL ARGUMENT

July 9, 1970

APPEARANCES:

For Plaintiff and Appellant:

DAVID KRAMER, in Propria Personae
3921 West Jefferson Boulevard
Los Angeles, California 90016
Telephone: RE 1-8761

For Defendant and Respondent Better Business Bureau of Los Angeles, Ltd.:

MESERVE, MUMPER & HUGHES
By DOWNEY A. GROSENBAUGH
612 South Flower Street
Los Angeles, California 90017
Telephone: 620-0300

LOS ANGELES, CALIFORNIA, THURSDAY, JULY 9, 1970

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MR. JUSTICE ROTH: Kramer v. Better Business Bureau.

MR. GROSENBAUGH: I am Downey A. Grosenbaugh, the attorney for the moving party and the respondent Better Business Bureau.

I am willing to submitthis motion on the briefs and record as it is filed.

I wish to make one observation that I feel would be proper, and under the Haskins v. Crumley case, that's on the last page of the brief, that if the court feels that the motion is well taken, that Mr. Kramer, the appellant be given additional time in order to prepare a full record on appeal, that, of course, presupposes the court agrees that our point is well taken, I might observe that we have called what we believe is an error to the trial court's attention and to the appellate court's attention before for the reason that we didn't want to appear to not do this and just sit back and take some advantage of a person that's appearing in pro per.

Unless the court has some inquiry I have no other comments to make.

MR. JUSTICE ROTH: All right. Mr. Kramer.

MR. KRAMER: First of all, we hadn't been advised that this was going to come up, and the defendants had

twenty months in which to advise us that they were going to bring up this motion, and they didn't do it. They brought it up approximately about June 15, knowing that the deadline was going to be June 15 -- I mean June 1 knowing that the deadline was going to be June 15.

The clerk's transcript on pages 640 to 869 shows the defendants in support of their motion on 631.8 gave the trial court and the plaintiffs a summary of testimony of witnesses in lieu of reporter's transcript to aid the trial court in making its decision. So this is a pretty late date for the defendants to deny that they stipulated that this could be used. I have --

JUSTICE HERNDON: Mr. Grosenbaugh, we have before us an incomplete record. As I understand your position, the appellant here proceeds on the erroneous notion that a review of a judgment made pursuant to 631.8 is similar to that on a directed verdict or nonsuit, whereas, in truth and in fact, our review simply calls for a determination whether there is substantial evidence to support the findings of the trial court adverse to the appellant.

The other proposition argued by the appellant, as I understand it, is that there was a waiver of a right to proceed, or to determine the case, under 631.8 because certain evidence had been received by the court offered by the defendant out of order. Well, that seems to me, probably, a completely untenable premise. At least as to the question

I intend to put. Why shouldn't the appeal be dismissed as frivolous, and because a completely inadequate record has been presented?

MR. [redacted]: My comment on that, Justice Herndon, to this, and some trial courts have made similar observations, even in this case. It is very difficult to prejudge actually what the law precisely is and what it may develop to be. I have become pretty modest about that because of finding myself in error many times. I believe that the point is not well taken. I believe that the record would show, although I have not examined it precisely, that number one the court has a right to conduct the order of trial. The mere fact that a single witness is called out of order, in this case, although it is not of record, for a very limited purpose, that this does not deprive the defendant of the right to make a motion under 631.8.

JUSTICE HERNDON: Well, it seems to me that any other rule would be absurd.

MR. [redacted]: I have to agree. I have not urged that for the reason that I do not believe that it was up to me to prescribe the method or the extent of the in pro per's appeal. I --

JUSTICE HERNDON: You must be aware, are you not, of the rule that the fact that a person appears in pro per, as has been observed from the bench here previously, he is not treated any different than a person that is represented

by counsel.

MR. GROSSENBAUGH: I understand that to be the law, your Honor. I understand and I agree. I wholeheartedly agree that the point is not well taken at all. And I would be perfectly willing to either amend my motion, or by writing, to have both the points on appeal stricken.

MR. JUSTICE ROTH: The court feels that it has gone over this matter, Mr. Kramer, and that this is a frivolous appeal. It is going to submit the motion because we may, unless convinced to the contrary, dismiss the appeal of our own motion. Therefore, we will give you ten days within which to submit a brief, if you so desire, to indicate to us the reasons why the appeal should not be dismissed as frivolous. And Mr. Grossenbaugh may have ten days in which to respond.

MR. GROSSENBAUGH: Thank you, your Honor.

MR. JUSTICE ROTH: Is that satisfactory to you?

MR. KRAMER: I think you must be kidding, because I have been about three and a half to four months preparing this brief, and to say that I should prepare another brief because of what he has just said must be -- I, I, -- It would take as much time to prepare another brief as it did the first one. And as far as being frivolous is concerned, I can't understand the position because -- Well, let me just state, the defendants have an advantage over the plaintiff for a very simple reason, this -- the judge --

John Wolpe, defendant, attorney defendant, of Beere-Roebuck has already discussed this case with the appellate court. Now --

MR. JUSTICE ROTH: Well, to commence with Mr. Kramer, Mr. Greenhough --

MR. KRAMER: I don't understand what you are telling me.

MR. JUSTICE ROTH: Mr. Greenhough didn't raise the point. Mr. Justice Herndon called it to his attention. The court has discussed this matter, and we are familiar with the record, and we feel that it is a frivolous appeal.

MR. KRAMER: On my part.

MR. JUSTICE ROTH: On your part, yes. We feel neither of the points you urge have any merit whatsoever, and we are inclined to dismiss the appeal of our own motion. Now, we will give you ten days within which to file a brief to convince us otherwise. If you want more time we will give you twenty days.

MR. KRAMER: Your Honor, I had advice of counsel when I filed these points. I didn't do it on my own.

JUSTICE HERNDON: You can consult the same counsel on your supplemental brief.

MR. JUSTICE ROTH: If counsel filed this brief our reply to him would be precisely what we are telling you. We are going to mark the matter submitted, and we will give the appellanttwenty days to file authorities to indicate

to us why the appeal should not be dismissed as frivolous, and give Mr. Greenhaugh ten days within which to reply.

MR. KRAMER: Your Honors, I don't think this case was filed frivolously. I think this case was filed in all sincerity and I think that all the trials that I have had heretofore, I mean with the trial court --

MR. JUSTICE ROTH: Mr. Kramer --

MR. KRAMER: -- I don't doubt whatsoever --

MR. JUSTICE ROTH: Mr. Kramer, we are not speaking about filing of the original case frivolously. We are speaking about the appeal.

MR. KRAMER: That is what I am talking about, the appeal. I was in all sincerity when I wrote the appeal, and the appeal, in my judgment, regardless of what your Honors say, is not frivolous, but a very serious thing. And to say that it is frivolous is covering up the actions of the trial court.

oooOooo

EXHIBIT B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DAVID RUBNER and STANFORD R. RUBNER, Plaintiffs and Appellants, v. SECURITY BUILDING BUREAU OF LOS ANGELES, LTD., a corporation, GLEN H. BRUCE, an individual, AIR-VENT (Aluminum) AWNING CO., a corporation, and SEARS ROEBUCK and CO., a corporation, Defendants and Respondents.	2D CIVIL NO. 36226 ORDER DISMISSING APPEAL

FILED
AUG 7 1970
CLERK

THE COURT:

Respondent moves to strike a point on appeal and dismiss appeal as to said point. This motion is directed to Point (1) of the Notice of Appeal.

This appeal is from a judgment for defendant entered pursuant to a motion under section 631.8 of the Code of Civil Procedure. The Amended Notice of Appeal states "The appeal is based on two points":

"(1) That the evidence presented by plaintiffs was adequate and sufficient to establish a prima facie case;

"(2) That Section 631.8 was inapplicable and beyond the right of the trial court to consider because

defendants had already introduced evidence on their behalf."

Appellant has provided a partial reporter's transcript. It is apparent that the appellant has misconceived the law concerning appellate review of a judgment under section 631.8 of the Code of Civil Procedure. The test is the same as a review of any other findings of a trial court. That is, is there substantial evidence in the record to support the trial court findings? (Greening v. General Air-Conditioning Corp., 233 Cal.App. 2d 545; Charles C. Chapman Building Co. v. California Mart, 2 Cal.App.3d 846.)

The appellant, however, seeks to convince this court that he presented evidence which established a prima facie case for the plaintiff. It is apparent that he is seeking to apply a rule of law which would be applicable to a non-suit. This explains the partial reporter's transcript.

Appellant's second point raised by the notice of appeal appears on its face to be groundless and without merit. There is nothing in section 631.8 of the Code of Civil Procedure which can be construed as limiting the power of a judge to grant such a motion simply because he has heard some defense testimony. In this case, as occurs so often in trial, the court permitted defendant

to put a single witness on the stand out of order during plaintiff's presentation of his evidence. This could in no way militate against the subsequent granting of a motion under section 631.8 of the Code of Civil Procedure.

At the time for oral argument on the motion on July 9, 1970, the court indicated a disposition to dismiss the appeal as frivolous. Only appellant Berman appeared in opposition to the motion. The court granted 20 days to appellants to submit supplemental points and authorities on why the court should not dismiss the appeal. Respondent was given 10 days to answer. Only appellant Kramer has filed anything with the court. On July 29, appellant Kramer filed a "Supplemental Opening Brief."

This document does not come to grips with the point raised in the motion nor with the court's view as to the second point on appeal.

The respondents' motion is granted. The remaining portion of the appeal is dismissed on the court's own motion.

The appeal of both Kramer and Berman is dismissed as to all respondents.

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

D KRAMER and STANFORD H. BERMAN,

Plaintiffs and Appellants,

vs.

ER BUSINESS BUREAU OF LOS ANGELES, a corporation, OLIN H. STAPP, an idual, AIR-VENT (Aluminum) AWNING a corporation, and SEARS ROEBUCK CO., a corporation,

Defendants and Respondents.

2D CIVIL NO. 36226

ORDER CORRECTING ORDER FILED AUGUST 27, 1970

AUG 28 1970

Clerk

Deputy Clerk

OURT:

The order dismissing the appeal filed August 27, is corrected as follows:

On page 3, line 7, strike "Berman" and in its insert the name "Kramer."

M-4

APPENDIX N

A monthly report to management

BETTER BUSINESS BUREAU

OF THE ANCHORAGE, INC.

27-1963 Ex 2

VOLUME 15, NUMBER 11

SUBSCRIPTION $10 PER YEAR

FEBRUARY 28, 1963

The libel suit of Rev-On Properties, Inc., doing business as H & H Publications, Jerome Lieberman and Leon D. Lieberman, against the BBB which was set for trial on January 22, was dismissed with prejudice on that date. This means that the action is concluded and cannot be refiled.

On January 23, David Kramer and Stanford H. Berman, doing business as Lifetime Awnings Company, filed a suit against the Bureau, the Times-Mirror Company, the Hearst Publishing Company and several firms selling awnings. The complaint alleges that Lifetime Awnings was damaged in the sum of 6 million dollars and seeks judgment for triple that sum. It charges that the defendants entered into a conspiracy wherein the Bureau issued false reports and the newspapers refused Lifetime Awnings' advertising from January, 1957 to June, 1959, except after censor by the Bureau. It alleges that at the same time identical advertising of competitors was carried. Among other allegations is the claim that the firm's competitors, although employing methods not different from those of Lifetime Awnings, referred prospective customers to the Bureau that they might be discouraged from purchasing awnings from Lifetime Awnings.

84 of the principle advertisers of swimming pools have signed agreements with the BBB to voluntarily comply with its new Swimming Pool Code. A half dozen of the firms are distributing the BBB's "Swimming Pool Purchaser's Guide" as a means of developing greater purchaser satisfaction and of alerting purchasers against tricky advertising and contract provisions.

The Consumer Bulletin, Spring issue is ready for distribution by member firms to their employees and others. If you have not placed a standing order, you may obtain them at $5 per hundred or $40 per thousand. Distribution will help protect employees against rackets and frauds, reduce garnishments and absenteeism, and enhance employer-employee relationships. Only member firms are privileged to distribute them.

The 33rd Annual Business Meeting of the L.A. BBB will be held at the Biltmore Hotel, Conference Room 8, on Wednesday noon, March 13. As is customary, proxies are being solicitated on behalf of the Bureau's Nominating Committee (J. C. Ligmon, Horace Brower and John V. Vaughn) to assure the presence of a quorum so that directors for the forthcoming year may be elected. The Bureau's fiscal year ends March 31. Later, a general meeting of Bureau members will be called to receive operating and financial reports for the year.

All members are welcome to attend the March 13 meeting, but because it will deal only with the necessary business of the corporation, no effort is being made to encourage attendance.

EXECUTIVE COMMITTEE

CHAIRMAN: Thomas C. McCoy, VP., NBC, General Manager, KNBC. VICE CHAIRMAN: Joe Powell, Owner, The Powell Company. PRESIDENT: Robert J. Bauer, General Manager, BBB. TREASURER: Robert Coulson, Vice President, Bank of America; James G. Bunstan, Jr., President, Bunstan & Company; J.B. Bryant Ellis, President, Ensign Manufacturing Co.; Ray B. Gage, President, Garvin, Johnston & Gage; Clifford E. Hughes, Senior Partner, Manatt, Manatt & Hughes; Henry Hunsaker, West Coast Representative, Banco Nacional de Mexico; J. C. Ligmon, Monterey Vice Chairman, Executive Committee, Union Bank; John V. Vaughn, President, Russell Laboratories, Inc.

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AIR-VENT AWNING CO.

FILED
Jul 2 - 1968
William C. Sharp, County Clerk
By /s/ F. Gray
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

STANFORD H. BERMAN, et al., Plaintiffs, vs. BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., et al., Defendants.	No. 812604 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter came on for trial before the Honorable Frank C. Cherbet, commencing on December 5, 1967, as a jury trial. Thereafter, the jury having been expressly waived by all parties, the case continued as a court trial.

The plaintiff Stanford H. Berman appeared by Attorney Reuben Rosenzweig; the plaintiff David Kramer appeared in propria personae; the defendant Better Business Bureau of Los Angeles, Ltd., a corporation, appeared by Mooserve, Numper & Hughes, through Attorney Downey A. Greenhalgh; the defendants Olin H. Stapp, an individual, and Air-Vent (Aluminum) Awning Co., a corporation, appeared by Attorney Robert A. Keller; and the defendant Sears, Roebuck and Co., a corporation, appeared by Wheeler, McCue & Knox through Attorney John J. McCue.

The Court directed that the order of proof would proceed first on the existence or non-existence of a conspiracy involving the Joint Pre-Trial Statement. After the plaintiffs had presented all of their evidence on these issues and had rested, the defendants presented a written motion supported by oral arguments for a judgment in behalf of all defendants pursuant to Section 631.8 of the Code of Civil Procedure. On May 17, 1968, this motion was submitted to the Court for decision.

The Court having heard the testimony, having examined the proofs offered by the respective parties, having considered the arguments presented by all of the parties, and being fully advised in the premises, makes its findings of fact as follows:

FINDINGS OF FACT

I

The defendants did not conspire between or among themselves to limit or reduce the production of pan and cover type of aluminum awnings, or to increase or fix the price thereof, or to prevent or limit competition in the manufacture or sale thereof, or to violate any other provisions of the Cartwright Act.

II

Defendant Sears, Roebuck and Co. did not, nor does it now, dominate the market for the sale and distribution of pan and cover type of aluminum awnings.

III

Defendants Air-Vent Aluminum Awning Co. and Olin H. Stapp did not, nor do they now, dominate the market for the manufacture, sale or distribution of pan and cover type of aluminum awnings; neither did these defendants heretofore have, nor do they now have, a monopoly in said market.

IV

The various publications of the Better Business Bureau, now in evidence, and the various letters, also now in evidence, written by employees of this defendant and relating to the plaintiffs and to other aluminum awning dealers, were intended to and did reasonably reflect the information that the Better Business Bureau had in its files, and the Better Business Bureau had probable cause to deem said information substantially accurate. Moreover, such publications and letters, not prompted by malice, were qualifiedly privileged under Section 47(3) of the Civil Code.

V

The unwarranted removal from the files of the Better Business Bureau by David Ross of papers containing some unfavorable information about O. H. Stapp and Air-Vent Aluminum Awning Co. was a gratuitous and unsolicited act having no relation to any alleged conspiratorial activity.

From the foregoing facts the Court concludes:

CONCLUSIONS OF LAW

1. The motion of the defendants for judgment under Section 631.8 of the Code of Civil Procedure should be granted.

2. The defendants are entitled to recover their costs.

3. Judgment should be entered accordingly.

DATED: July 2, , 1968.

/s/ Frank C. Charvat
FRANK C. CHARVAT, Judge

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. 1241

DAVID KRAMER,

Petitioner,

vs.

BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., a corporation, OLIN H. STAPP, an individual, AIR-VENT (ALUMINUM) AWNINGS CO., a corporation, and SEARS ROEBUCK AND CO., a corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT,
DIVISION TWO

MEMORANDUM OF RESPONDENT IN OPPOSITION

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DIVISION TWO

MEMORANDUM OF RESPONDENT IN OPPOSITION

Respondent sets forth herein its opposition to granting a writ of certiorari in memorandum form for the reason that it is unable to relate the

subject matter set forth in the petition to the headings used by petitioner therein.

Petitioner apparently seeks review of an Order Dismissing Appeal of the Court of Appeal of the State of California, Second Appellate District, Division Two, filed by said court on August 27, 1970, as corrected by further order filed August 28, 1970. These orders are not reported in any published report. Petitioner has reproduced said orders as Exhibit M to his petition herein, but has erroneously referred to them in his preliminary paragraph on page 1 of his petition as Exhibit A. Copies of said orders are appended to this response in the Appendix at pages A-1 through A-3 and page B-1.

LACK OF JURISDICTION

Petitioner invokes the jurisdiction of this court "under 28 U.S.C. 1257" (Petition, page 2, last line of first paragraph). Since review of a final decree of a state court is apparently being sought by writ of certiorari, only subsection (3) of said Section 1257 is possibly applicable. Nowhere in the petition is it alleged, however, that any of the statutory criteria set forth in said subsection (3) of said Section 1257 are present in this case.

The petition contains no allegation or suggestion that a treaty or statute of the United States is involved in any way, much less that the validity of such a treaty or statute has been drawn in question.

The petition contains no allegation or suggestion that the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States. The most that can be gleaned from a reading of petitioner's statement of the case is that he disagrees with the application of certain California Rules of Court to the steps taken by him in attempting to perfect an appeal through the California courts (Petition, page 5, paragraph IX and page 8, paragraph II). In so doing, he does not question the validity of any such rule or of any statute upon which the rule is based. To the contrary, he necessarily asserts the validity of such rules, seeking only that they be applied differently than they were to reach the present result. To the extent that a State statute might be involved, the only reference to any such statute is found in the decision of the California Court of Appeal set out in the Appendix hereto at pages A-1 through A-3. The California Court therein discusses the operation and application of Section 631.8 of the California Code of Civil Procedure; but nowhere does petitioner question the validity of that statute or its application. In point of fact the statute is not mentioned at all in the body of the petition on file herein.

The petition contains no allegation or suggestion that any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the Unted States.

Taken as a whole, the petition herein makes no affirmative showing that a federal question was presented for decision to the

highest court of the State having jurisdiction, that its decision of the federal question was necessary to the determination of the cause, that the federal question was actually decided, or that the judgment as rendered could not have been given without deciding it. On this state of the record, the Supreme Court has no jurisdiction to review a state court deicision. [Southwestern Bell Telephone Co. v. State of Oklahoma, 303 U.S. 206, 82 L. Ed. 751, 58 S. Ct. 528; Wilson v. Cook, 327 U.S. 474, 90 L. Ed. 793, 66 S. Ct. 663.]

LACK OF SPECIAL OR IMPORTANT REASONS

The petition herein does not set forth directly or by any fair inference from its allegations any special or important reason why appellate jurisdiction of the United States Supreme Court should be invoked by review on writ of certiorari. This is not a matter of right, but of sound judicial discretion. [Fay v. Noia, 372 U.S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822]

The case at bar does not in any way involve a decision of a Court of Appeals such as might be considered under Rule 19 (b) of the Supreme Court Rules.

Nor does the petition allege or suggest that a federal question of substance not theretofore determined by the United States Supreme Court was decided by a state court in this case, or that such a decision by a state court was made in a way probably not in accord with applicable decisions of the United States Supreme Court. [Rule 19 (a) Supreme Court Rules.].

Upon application to the United States Supreme Court for review of the judgment of a state court, it is the petitioner's burden to show affirmatively that the Supreme Court has jurisdiction. [Gorman v. Washington University, 316 U.S. 98, 86 L. Ed. 1300, 62 S. Ct. 962.] As the record fails to disclose any federal question having been decided in any way by a state court, the Supreme Court is without jurisdiction in this matter and the writ should not be granted. In the words of Mr. Chief Justice Taft, speaking for a unanimous Court:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L. Ed 712, 714, 43 S. Ct. 422.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DOWNEY A. GROSENBAUGH

Counsel for Respondent,
Better Business Bureau
of Los Angeles, Ltd.

Of Counsel,

ROBERT A. KELLER

APPENDIX A

[Opinion of the Court of Appeal, Second Appellate District, State of California, Division Two, Filed August 27, 1970, Clay Robbins, Jr., Clerk]

2nd Civil No. 36226

DAVID KRAMER and STANFORD H. BERMAN, Plaintiffs and Appellants, v. BETTER BUSINESS BUREAU OF LOS ANGELES LTD., a corporation, OLIN H. STAPP, an individual, AIR-VENT (Aluminum) AWNING CO., a corporation, and SEARS ROEBUCK and CO., a corporation, Defendants and Respondents.	ORDER DISMISSING APPEAL

THE COURT:

Respondent moves to strike a point on appeal and dismiss appeal as to said point. This motion is directed to Point (1) of the Notice of Appeal.

This appeal is from a judgment for defendant entered pursuant to a motion under section 631.8 of the Code of Civil Procedure.

The Amended Notice of Appeal states "The appeal is based on two points":

"(1) That the evidence presented by plaintiffs was adequate and sufficient to establish a prima facie case;

"(2) That Section 631.8 was inapplicable and beyond the right of the trial court to consier because defendants had already introduced evidence on their behalf."

Appellant has provided a partial reporter's transcript. It is apparent that the appellant has misconceived the law concerning appellate review of a judgment under section 631.8 of the Code of Civil Procedure. The test is the same as a review of any other findings of a trial court. That is, is there substantial evidence in the record to support the trial court findings? (Greening v. General Air-Conditioning Corp., 233 Cal. App. 2d 515; Charles C. Chapman Building Co. v. California Mart, 2 Cal. App. 3d 846.)

The appellant, however, seeks to convince this court that he presented evidence which established a prima facie case for the plaintiff. It is apparent that he is seeking to apply a rule of law which would be applicable to a non-suit. This explains the partial reporter's transcript.

Appellant's second point raised by the notice of appeal appears on its face to be groundless and without merit. There is nothing in section 631.8 of the Code of Civil Procedure which can be construed as limiting the power of a judge to grant such a motion simply because he has heard some defense testimony. In this

case, as occurs so often in trial, the court permitted defendant to put a single witness on the stand out of order during plaintiff's presentation of his evidence. This could in no way militate against the subsequent granting of a motion under section 631.8 of the Code of Civil Procedure.

At the time for oral argument on the motion on July 9, 1970, the court indicated a disposition to dismiss the appeal as frivolous. Only appellant Berman appeared in opposition to the motion. The court granted 20 days to appellants to submit supplemental points and authorities on why the court should not dismiss the appeal. Respondent was given 10 days to answer. Only appellant Kramer has filed anything with the court. On July 29, appellant Kramer filed a "Supplemental Opening Brief."

This document does not come to grips with the point raised in the motion nor with the court's view as to the second point on appeal.

The respondents' motion is granted. The remaining portion of the appeal is dismissed on the court's own motion.

The appeal of both Kramer and Berman is dismissed as to all respondents.

APPENDIX B

[Opinion of the Court of Appeal, Second Appellate District, State of California, Division Two, Filed August 28, 1970, Clay Robbins, Jr., Clerk]

2nd Civil No. 36226

DAVID KRAMER and SANFORD H. BERMAN, Plaintiffs and Appellants, vs. BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., a corporation, OLIN H. STAPP, an individual, AIR-VENT (Aluminum) AWNING CO., a corporation, and SEARS ROEBUCK and CO., a corporation, Defendants and Respondents.	ORDER CORRECTING ORDER FILED AUGUST 27, 1970

THE COURT:

The order dismissing the appeal filed August 27, 1970, is corrected as follows:

On page 3, line 7, strike "Berman" and in its place insert the name "Kramer."